Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

ELAINE DEATON, *et al.*,

Petitioners,

vs.

CITY OF DAYTON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has the Sixth Circuit Court of Appeals violated the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), for § 1983 claims in Ohio by adopting a two year statute of limitation for "bodily injury" instead of a four year residual personal injury statute?

2. Has the Sixth Circuit Court of Appeals violated the principles of 42 U.S.C. § 1988 by refusing to adopt, in the absence of Ohio Supreme Court precedent, the construction of Ohio's personal injury statutes as defined by an Ohio Court of Appeals?

PARTIES TO THE PROCEEDINGS

The names of all of the parties to the proceedings in the United States Court of Appeals for the Sixth Circuit are as follows:

Plaintiffs/Appellants/Petitioners:

Elaine Deaton, Constance Hurrier[1], Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis.

Defendants/Appellees:

City of Dayton and Billy C. Russell.

Unidentified individuals designated as defendants "John Smith(s) and Jane Smith(s)" in the original Complaint were never identified in this action and did not participate at any stage of the proceedings below.

None of the parties is a corporation, except that Respondent City of Dayton is a municipal corporation organized under the laws of Ohio. *See* Rule 29.1.

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1. Constance Hurrier was killed in an automobile accident while this action was pending before the Sixth Circuit, and her surviving spouse, Paul Hurrier, has been substituted as a party.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	4
A. Statement of Facts	4
B. Proceedings	5
Reasons for Granting the Writ	6
I. The Sixth Circuit Court of Appeals has violated the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), for § 1983 claims in Ohio by adopting a two year statute of limitation for "bodily injury" instead of a four year residual personal injury statute.	6
A. Supreme Court Precedent.	7
B. Sixth Circuit Case Law.	9

Contents

Page

C. Ohio Case Law. 10

II. The Sixth Circuit Court of Appeals has violated the principles of 42 U.S.C. § 1988 by refusing to adopt, in the absence of Ohio Supreme Court precedent, the construction of Ohio's personal injury statutes as defined by an Ohio Court of Appeals. 13

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 351 N.E. 2d 479 (1976) 11

Bojac Corp. v. Kutevac, 64 Ohio App. 3d 368 (Trumble Co. 1990) 6, 13, 14

Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) 9, 13

Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990) 10

Corpman v. Boyer, 171 Ohio St. 233, 169 N.E. 2d 14 (1960) 12

Elaine Deaton, et al., v. City of Dayton, et al., Case No. 92-4289 (6th Cir. 12/8/93) 1

Contents

	Page
Elaine Deaton, et al., v. City of Dayton, et al., Case No. C-3-92-152 (S.D. Ohio 11/3/92 (unreported)	1
Elzy v. Robinson, 868 F.2d 793 (5th Cir. 1989)	14
Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940)	14
Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989)	14
Lawyers Cooperative Publishing Co. v. Meuthing, 65 Ohio St. 3d 273, 603 N.E. 2d 969 (1992)	11
Owens v. Okure, 488 U.S. 235 (1989)	i, 6, 8, 9, 10, 12, 13
Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986)	14
Wilson v. Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)	6, 8, 10, 12
Yaklevich v. Kemp, Schaeffer & Rowe, 68 Ohio St. 3d 294 (1994)	11
Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983)	10, 11

Statutes Cited:

28 U.S.C. § 1254	1
28 U.S.C. § 1331	5

Contents

Page

28 U.S.C. § 1343 5

42 U.S.C. § 1983 ..... i, 1, 5, 6, 7, 8, 10, 13

Ohio Revised Code:

§ 2305.09 ..... 2, 7, 10, 12

§ 2305.09(D) 6, 9, 11, 12, 13

§ 2305.10 ..... 3, 7, 11

§ 2305.14 12

Other Authority Cited:

Restatement of the Law 2d, Torts (1965) 7 i, § 46(1) 11

APPENDIX

Appendix A — Order Denying Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit Filed February 24, 1994 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Sixth Circuit Filed December 8, 1993 . 3a

Appendix C — Decision and Order of the United States District Court for the Southern District of Ohio, Western Division at Dayton Filed November 3, 1992 ..... 11a

OPINIONS BELOW

The written decision of the United States Court of Appeals for the Sixth Circuit is titled *Elaine Deaton, et al., v. City of Dayton, et al.*, Case No. 92-4289 (6th Cir. 12/8/93) (unreported).

The written decision of the United States District Court for the Southern District of Ohio (Western Division) is titled *Elaine Deaton, et al., v. City of Dayton, et al.*, Case No. C-3-92-152 (S.D.Ohio 11/3/92) (unreported).

STATEMENT OF JURISDICTION

This action originated in the United States District Court for the Southern District of Ohio, and was brought pursuant to 42 U.S.C. § 1983.

The judgment of the United States Court of Appeals for the Sixth Circuit, affirming the dismissal of all claims, was entered on December 8, 1993. The Order of the Sixth Circuit denying a petition for rehearing en banc was entered on February 24, 1994.

By Order of this Court (Associate Justice Stevens) dated February 22, 1994, the time for filing a Petition for a Writ of Certiorari has been extended to and including May 7, 1994.

This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

Title 42 United States Code:

§ 1988 Proceedings in Vindication of Civil Rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred

on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Ohio Revised Code:

§ 2305.09 Four Years; Certain Torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

§ 2305.10 Bodily Injury or Injury to Personal Property.

An action for bodily injury or injury to personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily

injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

STATEMENT OF THE CASE

A. Statement of Facts

The factual record is comprised solely of the Affidavit of Plaintiff/Petitioner Kathleen Dewey, from which the relevant facts can be summarized as follows:

1. On March 29, 1989 Petitioners were arrested for criminal trespass, a nonviolent misdemeanor, while engaged in a protest at an abortion center in Kettering, Ohio.

2. Petitioners were transported to and housed as pre-trial detainees in the Dayton Human Rehabilitation Center ("DHRC") for approximately 11 days, where they were all strip searched as part of the intake and visitation procedures. During their incarceration, Petitioners believed that they were held in a facility of Montgomery County, Ohio, and supervised by County employees.

3. In March 1991, Petitioners filed a lawsuit against Montgomery County, Ohio and its employees, only to learn later that DHRC was operated by the City of Dayton.

4. This action against the City of Dayton and DHRC Superintendent Billy Russell was filed on April 7, 1992,

approximately three (3) years after the unconstitutional strip searches occurred.

B. Proceedings

On April 7, 1992, Petitioners Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis (collectively "Petitioners") filed a Complaint in the United States District Court for the Southern District of Ohio, Western Division, charging Defendants City of Dayton and Billy C. Russell (hereinafter referred to jointly as "the City"), and unidentified John Smith and Jane Smith Defendants with conducting illegal and unconstitutional strip searches. The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and § 1343. The Complaint sought compensatory and punitive damages, costs and reasonable attorney fees pursuant to 42 U.S.C. § 1988.

On May 27, 1992 the District Court issued a Pretrial Order limiting all action in the case to the resolution of the statute of limitations issue. On November 3, 1992, the District Court entered a Decision and Order granting the City's Motion for Summary Judgment on the statute of limitations issue and dismissing all claims with prejudice. On November 27, 1992, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court on December 8, 1993. On December 22, 1993 Petitioners filed a Application for Rehearing En Banc, which was denied by the Sixth Circuit in an Order dated February 24, 1994.

This Petition for a Writ of Certiorari is filed pursuant to an Order of this Court extending the time for filing until May 7, 1994.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that a writ of certiorari should be granted because of the Sixth Circuit's misapplication of Ohio's personal injury statutes, in the context of the following principles:

(1) The Sixth Circuit's decision violates the spirit and the underlying rationale of *Wilson v. Garcia*, 471 U.S. 261 (1985), which broadly characterized 42 U.S.C. § 1983 ("§ 1983") as conferring "a general remedy for injuries to personal rights";

(2) The Sixth Circuit's decision violates the specific holding of *Owens v. Okure*, 488 U.S. 235 (1989), which instructs the lower courts to adopt a state's "general or residual" statute of limitation for personal injuries, and specifically endorses, for states where there are multiple personal injury statutes, language nearly identical to that found in R.C. § 2305.09(D);

(3) The Sixth Circuit's decision disregards various decisions of the Supreme Court of Ohio clearly applying R.C. § 2305.09(D) as a residual personal injury statute;

(4) The Sixth Circuit's decision disregards the binding effect of *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368 (1990), a post-*Owens* decision by an intermediate state court selecting R.C. § 2305.09(D) as the residual personal injury statute of limitations for § 1983 actions in Ohio.

I. THE SIXTH CIRCUIT COURT OF APPEALS HAS VIOLATED THE MANDATE OF *OWENS V. OKURE*, 488 U.S. 235 (1989), FOR § 1983 CLAIMS IN OHIO BY ADOPTING A TWO YEAR STATUTE OF LIMITATION FOR "BODILY INJURY" INSTEAD OF A FOUR YEAR RESIDUAL PERSONAL INJURY STATUTE.

The two Ohio statutes which form the crux of this dispute state

in relevant part (emphasis supplied):

> **§ 2305.10 Bodily Injury or Injury to Personal Property.**
>
> An action for *bodily injury* or injury to personal property shall be brought within two years after the cause thereof arose....

and

> **§ 2305.09 Four Years; Certain Torts.**
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> * * *
>
> (D) *For an injury to the rights of the plaintiff not arising on contract nor enumerated* in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

Petitioners submit that a reading of these two statutes, in light of the case law discussed below, justifies *summary reversal* of the Sixth Circuit's decision in this case.

A. Supreme Court Precedent.

In the absence of guiding federal principles on § 1983 issues, the federal courts are instructed to apply state law principles which are not inconsistent with federal law. 42 U.S.C. § 1988. Looking to the various state laws, the lower courts struggled for years to select the appropriate statute of limitations for § 1983 cases, having to analogize between the respective state statutes and whatever

federal causes of action were at issue in a given case. Such an approach, however, bred confusion and inconsistency.

This Court took a major step toward clearing up the confusion when it decided *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254, 105 S. Ct. 1938 (1985), determining that the lower courts should abandon the confusing practice of characterizing claims and instead borrow and apply to *all* § 1983 claims in a given state a *single* statute of limitations. The *Wilson* Court went on to reject the application of intentional tort statutes in favor of a state's personal injury statute. Reviewing the history, purpose and policies underlying § 1983, the *Wilson* Court stated:

> Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights.

Wilson v. Garcia, 471 U.S. at 278.

Unfortunately, *Wilson* led to new confusion in states such as Ohio, where more than one personal injury statute exists. This Court addressed the dilemma of multiple personal injury statutes in *Owens v. Okure*, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989), rejecting New York's one year statute of limitations (covering eight intentional torts) in favor of its three year statute for actions "to recover damages for a personal injury except as [otherwise] provided . . . ." *Owens* held that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions. *Id.* at 249-50.

The *Owens* Court reasoned:

> In marked contrast to the multiplicity of state intentional

> tort statutes of limitations, every State has one general or residual statute of limitations governing personal injury actions. Some states have a general provision which applies to all personal injury actions with certain specific exceptions. Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions. *Whichever form they take, these provisions are easily identifiable by language or application.* Indeed, the very idea of a general or residual statute suggests that each State would have no more than one. Potential § 1983 plaintiffs and defendants therefore can easily ascertain, with little risk of confusion or unpredictability the applicable limitations period in advance of filing a § 1983 action.

488 U.S. at 245-48 (emphasis supplied). The language in R.C. § 2305.09(D) is clearly that referred to in *Owens* as "easily identifiable by language or application". No other Ohio personal injury statute has language even remotely resembling it.

B. Sixth Circuit Case Law.

In spite of this clear and unambiguous guidance from *Owens*, the Sixth Circuit refuses to adopt or even discuss the language in R.C. § 2305.09(D). Offering, for the first time, its rationale for choosing Ohio's "bodily injury" statute in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989)(en banc), the Sixth Circuit explained below that "we equated the general, unintentional personal injury cause of action referred to by the Supreme Court with the general, unintentional 'bodily injury' cause of action in Ohio Rev. Code § 2305.10." Curiously, this rationale was not stated in *Browning* or in any other Sixth Circuit decision prior to this case; § 2305.09(D) itself was mentioned nowhere in *Browning*.

Moreover, in spite of Petitioners' prodding, the Sixth Circuit has offered no analysis of § 2305.09(D) in this case either. Only

Senior District Judge Charles W. Joiner, sitting by designation from the Eastern District of Michigan, analyzed R.C. § 2305.09 in a separate concurring opinion and fully agreed with Petitioners. *See* Appendix at page 6a. Contrary to *Wilson* and *Owens*, the Sixth Circuit has adopted an extraordinarily narrow definition of personal injury (*i.e.*, "bodily injury") for Ohio's § 1983 claims, and refuses to consider the residual statute used for "non-bodily" personal injuries.

Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990), a nearly identical case decided by the Sixth Circuit for Kentucky, does no harm to Petitioners arguments. In *Collard*, the Sixth Circuit rejected a five year "personal rights" statute in favor of a one year statute for "injury to the person". The Sixth Circuit noted that the language "personal injury" appears nowhere else in Kentucky's statutory scheme and apparently concluded that the one year statute covered all personal injuries, both "bodily" and "non-bodily". The same conclusion simply cannot be drawn from Ohio's scheme and the judicial construction given to it by the Ohio Courts.

C. Ohio Case Law.

A review of Ohio case law exposes the flaws in the Sixth Circuit's approach. Ohio law clearly recognizes causes of action for "personal injuries" which involve more than mere "bodily injury", and § 2305.09(D) is always part of the analysis.

When the Supreme Court of Ohio first recognized the intentional infliction of emotional distress as an actionable tort in Ohio, it applied the four year limitations period found in R.C. § 2305.09(D). *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375 (1983). The standard adopted in *Yeager* leaves no doubt that it is a tort sounding in personal injury:

> One who by extreme and outrageous conduct

> intentionally or recklessly causes *severe emotional distress* to another is subject to liability from such emotional distress, and if *bodily harm* to the other results from it, for such *bodily harm.*

Restatement of the Law 2d, Torts (1965) 71, § 46(1). *Id.* at 374 (emphasis supplied).

More recently in *Lawyers Cooperative Publishing Co. v. Meuthing*, 65 Ohio St. 3d 273, 603 N.E. 2d 969 (1992), the Supreme Court of Ohio considered applying R.C. § 2305.09(D) to the tort of the negligent infliction of emotional distress. While discussing the emotional pain and distress which are the subject of these two "emotional distress" torts, the court stated: "There is no doubt that these are personal injuries." 65 Ohio St.3d at 280. Although the *Muething* court ultimately applied the two year statute of limitations embodied in R.C. § 2305.10 for the negligent infliction of emotional distress, it appears to have done so only because of the derivative relationship between that tort and the fear of "bodily injury". 65 Ohio St. 3d at 280. As Judge Joiner observed on page four of his concurring opinion below: "Implicit in this analysis was the court's recognition that § 2305.09(D) would apply *only if* one of the statutes listed therein did not." (Original emphasis). *See* Appendix at pages 9a - 10a.

Other "injuries to the person" for which the Supreme Court of Ohio has applied the four year provision of § 2305.09(D) include the loss of consortium, *Amer v. Akron City Hosp.*, 47 Ohio St.2d 85, 351 N.E.2d 479 (1976), and abuse of process. *Yaklevich v. Kemp, Schaeffer & Rowe*, 68 Ohio St. 3d 294 (1994). Significantly, the *Yaklevich* court referred to *Yeager* parenthetically by noting that the "four year statute of limitations [is] applicable to an *injury* not listed in any of the sections referred to in R.C. 2305.09." 68 Ohio St. 3d at 300. (Emphasis supplied). Clearly, the Supreme Court of Ohio has decided that R.C. § 2305.09(D) is Ohio's residual personal injury statute and regularly discusses it in that context.

Finally, Petitioners are compelled to address the argument propounded by the City in the proceedings below: that § 2305.09(D) is actually the type of "catch-all" statute rejected by *Wilson* and *Owens*, 488 U.S. at 250, n. 12. The City has managed to find an old Ohio case which referred to "the catch-all clause of § 2305.09(D)". *Corpman v. Boyer*, 171 Ohio St. 233, 169 N.E. 2d 14 (1960). This, however, is a feckless argument for several reasons.

First, it pays homage to a phrase found in a 24 year old case while ignoring the manner in which the statute has been used by Ohio's courts. Even *Corpman* is a loss of consortium case which relied on § 2305.09(D). Second, from a functional standpoint, it is clear that Ohio's catch-all statute (ten years) is found in R.C. § 2305.14, which states:

> **§ 2305.14 FOR OTHER RELIEF**
>
> An action for relief not provided for in sections 2305.04 to 2305.131 [2305.13.1], inclusive, and section 1304.29 of the Revised Code, shall be brought within ten years after the cause of action accrued. This section does not apply to an action on a judgment rendered in another state or territory.

Surely the City does not suggest that Ohio has two catch-all statutes.

Third, R.C. § 2305.09 is accompanied by the title "Certain Torts," which limits its application much more so than the "For Other Relief" label attached to § 2305.14. Clearly, § 2305.09(D) is Ohio's residual personal injury statute and § 2305.14 is Ohio's catch-all statute. Finally, even if one insists on calling R.C. § 2305.09 a "catch-all" statute, its use is clearly compatible with, and even required by, the express language in *Owens*, 488 U.S. at 246, n.9; 488 U.S. at 251, n.12.

II. THE SIXTH CIRCUIT COURT OF APPEALS HAS VIOLATED THE PRINCIPLES OF 42 U.S.C. § 1988 BY REFUSING TO ADOPT, IN THE ABSENCE OF OHIO SUPREME COURT PRECEDENT, THE CONSTRUCTION OF OHIO'S PERSONAL INJURY STATUTES AS DEFINED BY AN OHIO COURT OF APPEALS.

In *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 370 (Trumble Co. 1990), the Court of Appeals for Trumble County, Ohio determined, in a post-*Owens* analysis, that R.C. § 2305.09(D) is the general or residual statute for personal injury actions in Ohio. To Petitioners' knowledge, *Bojac* is the only Ohio appellate case offering a post-*Owens* analysis of Ohio law without relying on Sixth Circuit precedent. All other Ohio cases cited in this action by the Sixth Circuit and the City rely upon the Sixth Circuit's dubious *Browning* rationale and present no independent state court analysis of the relevant Ohio statutes.

Petitioners submit that the Sixth Circuit erred, and engaged in the wrong analysis, when it concluded in this case that it did not have to follow *Bojac* because "the problem of characterization 'is ultimately a question of federal law.'" *See* Sixth Circuit opinion at Appendix page 5a. Petitioners submit that the "characterization" game ended with *Wilson's* broad characterization of all § 1983 claims as personal injuries. The issue has now shifted to one of applying state law, and requires an interpretation of a state's statutory scheme for personal injuries. This is, at best, a hybrid of state/federal law and the *Owens* directive to apply a residual statute of limitations which "embraces, either explicitly or by *judicial construction,* unspecified personal injury actions", *Owens,* 488 U.S. at 250, n. 12 (emphasis supplied), clearly requires an analysis of state court judicial decisions. The fact that federal law is defined by state law for issues such as this is a bit confusing, but should not allow the lower federal courts to disregard state law altogether, as the Sixth Circuit has done here.

The other federal circuits seem to understand their duty to look to state law. *See Elzy v. Robinson,* 868 F.2d 793, 794 (5th Cir. 1989)(referencing Louisiana case law); *Gray v. Lacke,* 885 F.2d 399, 408 (7th Cir. 1989)(referencing Wisconsin case law); *Small v. Inhabitants of City of Belfast,* 796 F.2d 544 (1st Cir. 1986) (referencing Maine case law).

Returning to the significance of *Bojac,* this Court has previously made clear that the decisions of *intermediate* state courts are binding on the federal courts on issues of state law:

> The highest state court is the final authority on state law, but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law, even though it has not been expounded by the highest court of the State. . . . An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-78, 61 S.Ct. 176, 178, 85 L. Ed. 109 (1940)(case involving the construction and effect of a state statute).

The *Bojac* case, therefore, provides a second reason why the Sixth Circuit must be reversed in this case. Any other result empowers federal circuit courts to override the state courts on matters of state law.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals violates the binding decisions of this Court and disregards the judicial construction given to Ohio's personal injury statutes, both implicitly and explicitly, by the Supreme Court of Ohio and an intermediate state court. Petitioners respectfully suggest again that summary reversal is appropriate in this case.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 24, 1994

No. 92-4289

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE DEATON, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF DAYTON, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-4289

ELAINE DEATON, *et al.*

Plaintiffs-Appellants,

v.

CITY OF DAYTON, *et al.*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen, and Margaret Geis appeal the dismissal of their civil rights action brought pursuant to 42 U.S.C. § 1983. The district court found that the plaintiffs' claims were barred by the two-year Ohio statute of limitations for personal injury actions. We affirm.

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix B

On March 24, 1989, the plaintiffs were arrested while engaging in an anti-abortion protest at the Dayton Women's Health Center in Kettering, Ohio. Plaintiffs allege that they were taken to the Dayton Hurman Rehabilitation Center and subjected to unlawful strip and body cavity searches. They subsequently filed suit against the city of Dayton, Superintendent Billy C. Russell of the Rehabilitation Center, and various unnamed defendants on April 7, 1992, more than three years after the alleged incident.

In *Browning v. Pendleton,* 869 F.2d 989, 992 (6th Cir. 1989) (en banc), this Court held that civil rights actions arising in Ohio must be brought within two years of their accrual, pursuant to Ohio Rev. Code § 2305.10. In reaching this conclusion, the *Browning* court relied on *Wilson v. Garcia, 471* U.S. 261 (1985) (single state personal injury statute of limitations must be borrowed for § 1983 purposes), and *Owens v. Okure,* 488 U.S. 235, 239 (1989) (if multiple state personal injury statutes exist, court must borrow general or residual unintentional tort statute). In *Browning,* 869 F.2d at 991, we equated the general, unintentional personal injury cause of action referred to by the Supreme Court with the general, unintentional "bodily injury" cause of action in Ohio Rev. Code § 305.10. This statute, as stated above, carries a two-year statute of limitations. Plaintiffs' cause of action accrued on March 24, 1989. *See Sevier v. Turner,* 742 F.2d 262, 272 (6th Cir. 1984) (accrual occurs when plaintiff knows or has reason to know of injury that is basis of his action). As plaintiffs did not file their complaint until more than three years after that date, their action is barred by the statute of limitations.

Plaintiffs argue strenuously that this Court is bound by the decision in *Bojac Corp. v. Kutevac,* 64 Ohio App. 3d 368 (1990), which held that Ohio Rev. Code § 2305.09 was the applicable general personal injury statute for civil rights actions, rather than

Appendix B

§ 2305.10. Section 2305.09 provides for a four-year statute of limitations. Plaintiffs' contention is without merit.

When federal courts borrow state statutes of limitations for § 1983 claims, it is well settled that "the problem of characterization 'is ultimately a question of *federal* law.'" *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 183 (6th Cir. 1990) (quoting *Wilson*, 471 U.S. at 26970 (emphasis added)). The Sixth Circuit, following *Owens* and *Wilson*, has repeatedly characterized § 2305.10, with its two-year statute of limitations, as the applicable Ohio personal injury statute for § 1983 civil rights actions. *See, e.g, Browning*, 869 F.2d at 990; and *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1400 (6th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991). Plaintiffs' claims are therefore barred.

For the foregoing reasons, the decision of the district court is affirmed.

Appendix B

NO. 92-4289
ELAINE DEATON. et al. v. CITY OF DAYTON,. et al.

CHARLES W. JOINER, Senior District Judge, concurring. I concur in the affirmance of the district court's judgment, recognizing that *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989) (en banc), binds this panel, and requires the application of Ohio's two-year statute of limitations. However, *Browning* did not consider adoption of the statute advanced by plaintiffs.[1] I am persuaded that plaintiffs are correct in their contention that Ohio Rev. Code § 2305.09 is the appropriate statute of limitations to apply to civil rights actions under 42 U.S.C. § 1983.

In *Wilson v. Garcia,* 471 U.S. 261 (1985), the Supreme Court held that § 1983 actions are properly characterized under federal law as tort actions for personal injuries, explaining that the atrocities that led to the enactment of § 1983 "plainly sounded in tort," and that a violation of a constitutional right is "an injury to the individual rights of the person," thus making the tort analogy appropriate. *Id.* at 277. Based upon this characterization, the Court affirmed the appellate court's application of the state's three-year statute for "injury to the person or reputation of any person." *Id.* at 280. Recognizing that § 1983 provided a general remedy for injuries to personal rights, the Court stated that the relative scarcity of statutory claims when Congress enacted § 1983 in 1871 made it "unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many States." *Id.* at 278.

---

1. The choice in *Browning* was between the two-year statute, Ohio Rev. Code § 2305.10, and the one-year statute, § 2305.11. As far as can be discerned from the decisions of this court, the applicability of § 2305.09 was neither argued in *Browning* nor decided *sub silentio. See Brownina v. Pendleton,* 1988 U.S. App. LEXIS 4510 (6th Cir. 1988).

Appendix B

While *Wilson* intended to eliminate the conflict among the lower courts in choosing the appropriate statute of limitations for 1983 actions, the decision simply narrowed the conflict to a different arena. The next question confronted by courts was *which* personal injury statute of limitations should be borrowed for § 1983 suits. *Owens v. Okure*, 488 U.S. 235 (1989), answered that question, holding that in a state which has more than one personal injury statute, the general or residual statute governing personal injury actions is to be applied:

> Some States have a general provision which applies to all personal injury actions with certain specihc exceptions. Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions. Whichever form they take, these provisions are easily identifiable by language or application. Indeed, the very idea of a general or residual statute suggests that each State would have no more than one.

488 U.S. at 246-48 (footnotes omitted). Attempting to clarify its earlier rejection of "catchall" statutes of limitations, the Court stated:

> Our decision today is fully consistent with *Wilson's* rejection of a state residual, or "catchall," limitations provision as the appropriate one for 1983 actions. 471 U.S., at 278. In *Wilson*, we rejected recourse to such provisions in the first instance, a position we continue to embrace. Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and *the residual one embraces, either explicitly or by judicial construction. unspecified personal injury actions.*

Id. at 250 n.12 (emphasis added).

Taken together, *Wilson* and *Owens* instruct that in determining the appropriate statute of limitations to borrow for § 1983 actions, we are to start with the state statute of limitations for personal injury actions. If a state has more than one such statute, we are to apply the general or residual statute. To determine which statute falls into that category, we are to look at the express language of the statute and the manner in which it has been construed. The statute which embraces unspecified personal injury actions is the appropriate statute to borrow.

The two Ohio statutes of limitations at issue are Ohio Rev. Code § 2305.10 (already selected by this court as the appropriate statute) and § 2305.09. They provide in pertinent part as follows:

> **§ 2305.10 Bodily injury or injury to personal property.**
>
> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.
>
> **§ 2305.09 Four years; certain torts.**
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> (A) For trespassing upon real property;
>
> (B) For the recovery of personal property, or for taking or detaining it;
>
> (C) For relief on the ground of fraud;

> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

Subsection 2305.09(D)'s reference to actions for injuries to the rights of the plaintiff not enumerated in the designated sections expressly and unequivocally "embraces . . . unspecified personal injury actions," *Owens*, 488 U.S. at 250 n.12, and the statute has been so construed by the Ohio Supreme Court. In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983), the Ohio Supreme Court first recognized the tort of intentional infliction of emotional distress, and then was required to determine whether the plaintiff's action was time-barred. The answer to this issue was easily determined: because "the tort of intentional infliction of serious emotional distress [was] not listed in any of the sections referred to in R.C. 2305.09, the applicable statute of limitations for this cause of action will be four years." 453 N.E.2d at 672.

More recently, the Ohio Supreme Court was required to decide whether an attorney's negligence claims against a publisher of legal forms was governed by § 2305.09 or § 2305.10. *Lawyers Cooperative Publishing Co. v. Muething*, 603 N.E.2d 969 (Ohio 1992). After examining the provisions of both, the court stated that it was required to ascertain whether the plaintiff's claims fell within § 2305.10. Implicit in this analysis was the court's recognition that § 2305.09(D) would apply *only if* one of the statutes listed therein did not. Turning its focus then to § 2305.10, the court concluded that the attorney's cause of action for damage to his law practice was an action for injury to personal property, and that his negligence claim was an action for "bodily injury," making both claims subject to § 2305.10. Critical to the court's determination of the negligence claim was its recognition that *no* recovery was possible unless the plaintiff first proved that he had

feared or seen physical consequences or quantifiable physical loss, *i.e.*, "bodily injury" within the meaning of § 2305.10. 603 N.E.2d at 974-75.

Both *Yeager* and *Muething* demonstrate that § 2305.09 is Ohio's residual statute of limitations for personal injury actions. Based on *Owens*, § 2305.09 is the correct statute to borrow for civil rights actions under 42 U.S.C. § 1983. The only court, state or federal, to have expressly considered the residual nature of § 2305.09 agrees. *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 581 N.E. 2d 625 (1990).[2]

Finally, the propriety of adopting § 2305.09 as the statute applicable to § 1983 claims is in no way undercut by this court's decision in *Collard v. Kentucky Board of Nursing*, 879 F.2d 179 (6th Cir. 1990). There the court rejected a Kentucky statute applicable to actions for injuries to the rights of plaintiffs in favor of Kentucky's "personal injury" statute of limitations, stating that in the interest of simplicity and uniformity, the Supreme Court designated "personal injury" statutes as the benchmark. *Id.* at 182. Such a facile solution is not available in Ohio, where there is no general "personal injury" statute, and the choice is between a "personal rights" statute and a "*bodily* injury" statute. As the Supreme Court recognized in *Wilson*, 1983 "confer[s] a general remedy for injuries to personal rights." 471 U.S. at 278.

For these reasons, I am persuaded that the plaintiffs are correct in their assertion that § 2305.09 is the correct statute to borrow in § 1983 cases.

---

2. The wisdom of adopting § 2305.09 is neither enhanced by, nor detracted from, the litany of cases cited by defendants and alluded to by the panel decision. This court has spoken in *Browning*, binding subsequent panels in this court and all of the district courts. In none of the Ohio cases relied upon by the defendants was the issue under consideration here advanced or decided.

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION AT DAYTON FILED NOVEMBER 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-92-152

Magistrate Judge Michael R. Merz

ELAINE DEATON, et al.,

Plaintiff(s),

- vs -

CITY OF DAYTON, et al.,

Defendant(s).

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an action by Plaintiffs to recover damages for being subjected to allegedly unlawful strip and body cavity searches when they were arrested for their participation in an abortion protest in March, 1989.

Plaintiffs bring suit under both 42 U.S.C. § 1983 and Ohio Revised Code § 2933.32, thus invoking this Court's subject matter jurisdiction under 28 U.S.C. § 1331, 1343, and 1367.

Appendix C

Defendants assert that all claims are barred by the applicable statutes of limitations.

Congress has adopted no statute of limitations for actions under 42 U.S.C. § 1983, so the federal courts "borrow" state statutes of limitations. For many years this seemingly simple rule led to quite diverse results. To correct the confusion and injustice, the United States Supreme Court determined in *Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), that in each state a single state statute of limitations the statute applicable to personal injuries was the one which would be borrowed. Applying that rule, the Sixth Circuit Court of Appeals has determined that Ohio's two year statute for personal injuries, Ohio Revised code § 2305.10, would be applicable. *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989); *Farber v. Massilon Board of Education,* 917 F. 2d 1391 (6th Cir. 1990), *cert. denied,* __ U.S. __, 115 L.Ed.2d 1019 (1991). Since the conduct of which Plaintiffs complain occurred more than three years before the Complaint in this action was filed, Plaintiffs' claims under 42 U.S.C. § 1983 are time barred.

Plaintiffs acknowledge *Browning* and *Farber,* but claim the Sixth Circuit in those cases misapplied the relevant Supreme Court authority, *Owens v. Okure,* 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In that case the Supreme Court determined a three-year New York personal injury statute should be applied rather than the one-year statute applicable to intentional torts. In so doing, the Supreme Court implicitly overruled *Mulligan v. Hazard,* 777 F. 2d 340 (6th Cir. 1985), *cert. denied,* 476 U.S. 1174 (1986). and the Sixth Circuit recognized that when it handed down *Browning, supra.*

As Defendants point out, the Sixth Circuit has considered and rejected proposed application of Ohio Revised Code § 2305.09, the

four-year statute for which Plaintiffs contend. *Mulligan, supra; Hall v. Cuyahoga Valley Bd. of Educ.*, 926 F. 2d 505 (6th Cir.), *cert. denied sub nom., Hull v. Schuck*, __ U.S. __, 115 L.Ed.2d 1080 (1991); *Paladin v. Doyle*, No. 90-3242, 1990 U.S. App. LEXIS 17324 (6th Cir. Sept. 27, 1990) (914 F.2d 1494 table); and *McSurley v. Hutchinson*, 823 F. 2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). Also, in terms of its language, § 2305.10 is a general personal injury statute whereas § 2305.09 is a catch-all statute.

Plaintiffs argue, however, that this Court is bound to follow the decision of the Trumbull County Court of Appeals in *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368 (1990), which held that § 2305.09 was the applicable statute for actions under § 1983 rather than § 2305.10. This is not a situation, however, where state law applies. In looking to state statutes of limitations under 42 U.S.C. § 1988, the federal courts are "borrowing" state law limitations into federal law. Limitations questions in § 1983 actions are unquestionably a matter of federal law. *Sevier v. Turner*, 742 F. 2d 262 (6th Cir. 1984). In any event, even if it were a question of state law, this Court would be bound to follow the view of the Sixth Circuit on what the relevant state law is, even in the face of a state intermediate appellate court decision to the contrary.

Plaintiffs also invoke the supplemental jurisdiction of this Court under 28 U.S.C. § 1367 (formerly called pendent jurisdiction). Defendants respond that the state law claims made are also barred by the relevant statute of limitations, Ohio Revised Code § 2744.04, which limits claims for improper strip or body cavity searches to two years. Plaintiffs concede this is so with respect to the City of Dayton itself, but claim that § 2744.04 does not apply to claims against the individual City employees who are Defendants and who actually conducted the searches.

Plaintiffs' position in this regard is also not well taken. The authority cited by Defendants, *Bojac, supra,* while not ultimately helpful to Plaintiffs on their federal law claim, is fatal to their state law claim. Exercising its supplemental jurisdiction, this Court is bound to follow state law and the best evidence of that law at this time is the *Bojac* decision, which holds the period of limitations in § 2744.04 applies to both cities and their employees.

Accordingly, the Complaint herein is ordered DISMISSED WITH PREJUDICE in that all claims therein are barred by the relevant statutes of limitations.

s/ Michael R. Merz
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

November 3, 1992.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ELAINE DEATON, et al.,
Plaintiff(s),

- vs - Case No. C-3-92-152

CITY OF DAYTON, et al.,
Defendant(s)

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment (Doc. #7) is GRANTED;

that Judgment is entered in favor of the Defendants City of Dayton and Billy C. Russell and against the Plaintiffs Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis;

and that the Complaint is DISMISSED WITH PREJUDICE.

Date November 3. 1992 Kenneth J Murphy, Clerk

s/ Karla S. Evans
By) Deputy Clerk

Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1773

In The

Supreme Court of the United States

October Term, 1993

ELAINE DEATON, et al.,

Petitioners,

v.

CITY OF DAYTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the general personal injury statute of limitations in Ohio, R.C. § 2305.10, is the appropriate statute of limitations for § 1983 claims arising in Ohio as set forth by the Sixth Circuit Court of Appeals in *Browning v. Pendleton*, 869 F.2d 992 (6th Cir. 1989) (en banc).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

PROCEEDINGS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT R.C. § 2305.10 IS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS IN OHIO APPLICABLE TO § 1983 ACTIONS 3

A. THE DETERMINATION OF THE APPROPRIATE STATUTE OF LIMITATIONS FOR § 1983 ACTIONS IS PECULIARLY A FUNCTION OF FEDERAL LAW 6

B. REFERENCE TO LAW OF OHIO DEMONSTRATES THAT R.C. § 2305.10 IS BROADLY CONSTRUED AS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS 7

C. A MAJORITY OF COURTS IN OHIO WHICH HAVE CONSIDERED THE ISSUE HAVE ADOPTED R.C. § 2305.10 AS THE APPLICABLE STATUTE OF LIMITATION FOR § 1983 CLAIMS 9

TABLE OF CONTENTS – Continued

Page

D. APPLICATION OF R.C. § 2305.10 PROMOTES THE REMEDIAL PURPOSE OF § 1983 WHILE AT THE SAME TIME FURTHERING THE GOAL OF A STATUTE OF LIMITATION..... 10

CONCLUSION 12

APPENDIX 1A

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 11

Bojac Corp. v. Kutevac, 64 Ohio App. 3d 368, 581 N.E.2d 625 (Trumble Cty. 1990) 9

Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) *passim*

Burnett v. Grattan, 468 U.S. 42 (1984) 7

Burrell v. Newesome, 883 F.2d 416 (5th Cir. 1989) 11

Cito v. Bridgewater Township Police Dept., 892 F.2d 23 (3d Cir. 1989) 11

Collard v. Kentucky Bd. of Nursing, 896 F.2d 179 (6th Cir. 1990) 6

Coopwood v. Lake County Comm. Dev. Dept., 932 F.2d 677 (7th Cir. 1991) 11

Dennis v. Toledo Police Dept., Case No. L-90-157 1991 Ohio App. LEXIS 1583 (Lucas Cty. 1991) 10

Emmons v. McLaughlin, 874 F.2d 351 (6th Cir. 1989) 5

Francis v. Cleveland, 78 Ohio App. 3d 593, 605 N.E. 966 (8th Dist. Ct. App. 1992) 5, 10

Freshour v. Carroll, Case No. 88CA 34, 1989 Ohio App. LEXIS 3273 (Pickaway Cty. 1989), *mot. overruled*, 48 Ohio St. 3d 706, 549 N.E.2d 1193 (1990) 10

Friedman v. Estate of Presser, 929 F.2d 1151 (6th Cir. 1991) 5

Harris v. Board of Educ., 798 F. Supp. 1331 (S.D. Ohio 1992) 5

TABLE OF AUTHORITIES – Continued

Page

Hull v. Cuyahoga Valley Joint Vocational School Dist. Board of Education, 926 F.2d 505 (6th Cir. 1991) . . . 5, 9

Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989) 11

Lawyers Cooperative Pub. Co. v. Muething, 65 Ohio St. 3d 273, 603 N.E.2d 969 (1992) 8

Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986) 4, 5

Owens v. Okure, 488 U.S. 235 (1989) 4, 6, 9, 10, 11

Paladin v. Doyle, Case No. 90-3242 1990 U.S. App. LEXIS 17324 (6th Cir. 1990) 5, 6

Perez v. Seevers, 869 F.2d 425 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989) 11

Ressallat v. Burglar & Fire Alarms Inc., 79 Ohio App. 3d 43, 606 N.E.2d 1001 (1992) 8

Thomas v. Shipker, 872 F.2d 772 (6th Cir. 1989) 5

Twine v. Probate Court, Case No. 89AP-1170, 1990 Ohio App. LEXIS 2665 (Franklin Cty.) *mot. overruled*, 55 Ohio St. 3d 706, 563 N.E.2d 301 (1990) 10

Wilson v. Garcia, 471 U.S. 261 (1985) 3, 7, 9, 11

Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A., 68 Ohio St. 3d 294, 626 N.E.2d 115 (1994) 9

STATEMENT OF THE CASE

STATEMENT OF FACTS

On March 24, 1989, as a result of blocking the entrance to the Dayton Women's Health Center in Kettering, Ohio, plaintiffs were arrested and charged with criminal trespass in violation of a Montgomery County Common Pleas Court injunction. Initially, petitioners were detained at both the Kettering City Jail and Montgomery County Jail and then were later transferred to the Dayton Human Rehabilitation Center (DHRC).

Petitioners allege that while being processed into the DHRC, each of them was subjected to a strip search as part of the incarceration procedures. In addition, petitioners allege they were subjected to further strip searches while detained at the center.

Petitioners filed suit on March 22, 1991, approximately two days before the applicable statute of limitations expired. Petitioners originally filed suit against Montgomery County, Ohio and its employees, erroneously believing those entities were the proper parties. The defendants in that action moved for summary judgment on the grounds that petitioners had failed to name the proper parties as defendants as none of the defendants were in any way connected to the DHRC. The court granted defendants' motion for summary judgment on February 27, 1992. Petitioners in that case took no action during the pendency of the initial suit to amend their pleadings to add any of the present respondents.

After losing on summary judgment grounds in the initial suit, petitioners later asserted suit against the City of Dayton, the superintendent of the DHRC, and several

unidentified city employees alleged to have conducted the strip searches. That suit was filled approximately three years after the alleged acts took place. Respondents filed and were granted summary judgment on the issue of the statute of limitations. That issue is now before the Court.

PROCEEDINGS

Respondent has no dispute as to the procedural history as narrated by petitioner in this action.

SUMMARY OF ARGUMENT

In 1989, pursuant to the mandate of the United States Supreme Court, the Sixth Circuit Court of Appeals selected the general personal injury statute of limitations in Ohio, R.C. § 2305.10 as applicable to § 1983 claims. That statute of limitations has been uniformly applied to § 1983 claims since that time. The four-year statute of limitations, R.C. § 2305.09(D), was appropriately rejected as being more in the nature of a catch-all statute. Catch-all statutes have been expressly rejected as inapplicable to § 1983 claims by the United States Supreme Court. The four-year statute of limitations was also properly rejected on the grounds that it has been construed to be applicable to intentional tort causes of actions. Section 1983 claims are not properly analogized to intentional tort causes of action.

Although R.C. § 2305.10 appears to be limited to claims for "bodily injury and property damage," courts have broadly construed it to include substantially all claims for personal injury. The majority of those courts in Ohio which have considered the issue have applied R.C. § 2305.10 to § 1983 claims. The two-year statue of limitation furthers the remedial purpose of § 1983 while at the same time providing a reasonable end to any stale claims.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT R.C. § 2305.10 IS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS IN OHIO APPLICABLE TO § 1983 ACTIONS.

No federal statute of limitations period exists for § 1983 actions. As a result, courts were instructed to borrow the state statute of limitation which was most analogous to the particular § 1983 claim. However, since statutes of limitations varied widely from state to state, it was not possible to achieve uniformity among states regarding a § 1983 statute of limitations.

Originally, the United States Supreme Court addressed this issue in *Wilson v. Garcia,* 471 U.S. 261 (1985). In *Wilson,* the United States Supreme Court held that in each state, a single statute of limitations should be borrowed for § 1983 claims and that the period favored should be one governing "general personal injury actions, sounding in tort." *Wilson,* 471 U.S. at 279. In so

ruling, the court in *Wilson* expressly rejected catch-all periods of limitations. *Id.* at 278.

However, the decision in *Wilson* did not completely resolve the issue. Several states possessed various statutes of limitation for identifiable causes of action. Several federal circuits, including the Sixth Circuit Court of Appeals, concluded the state statute of limitations applicable to intentional torts was the appropriate statute of limitations for § 1983 claims. *See Mulligan v. Hazard*, 777 F.2d 340, 344 (6th Cir. 1985).

As a result of these holdings, the United States Supreme Court revisited this issue in *Owens v. Okure*, 488 U.S. 235 (1989). The Court in *Owens* found that § 1983 claims were *not* to be analogized to intentional torts and that:

> applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope. We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

Owens, 488 U.S. at 249-250. In *Owens*, the Court reasserted its rejection in *Wilson* of catch-all statutes of limitation. *Id.* at 250, n. 12.

With the aid of the decision in *Owens*, the Sixth Circuit Court of Appeals in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc), laid to rest the confusion and uncertainty as to which of Ohio's several statute

of limitations was applicable to § 1983 claims. In *Browning*, the Sixth Circuit, in an en banc decision, held that the general personal injury statute of limitation, Ohio Rev. Code § 2305.10, which provided a two-year statute of limitations, was the appropriate statute of limitations for § 1983 claims. The Sixth Circuit's holding in *Browning*, five years ago, provided a significant measure of uniformity and predictability with respect to § 1983 claims and the applicable statutes of limitations. As a result, Ohio Rev. Code § 2305.10, has been uniformly applied to § 1983 claims arising in the state of Ohio. *See Thomas v. Shipker*, 872 F.2d 772 (6th Cir. 1989); *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989); *Hull v. Cuyahoga Valley Joint Vocational School Dist. Board of Education*, 926 F.2d 505 (6th Cir. 1991); *Friedman v. Estate of Presser*, 929 F.2d 1151 (6th Cir. 1991); *Harris v. Board of Educ.*, 798 F. Supp. 1331 (S.D. Ohio 1992); *Francis v. Cleveland*, 78 Ohio App. 3d 593, 605 N.E.2d 966 (8th Dist. Ct. App. 1992).

Petitioner asserts that the decision in *Browning* is contrary to the Supreme Court's holding in *Owens* and that R.C. § 2305.09(D) is the appropriate statute of limitations for § 1983 claims in Ohio. Contrary to petitioner's assertions, the Sixth Circuit Court of Appeals has considered and rejected Rev. Code. § 2305.09(D) as applicable to § 1983 claims, finding that statute of limitations is more in the nature of a catch-all statute of limitations as compared to the general personal injury statute of limitations of R.C. § 2305.10. *Mulligan v. Hazard*, 777 F.2d 340, 343, n. 4 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986). The Sixth Circuit reaffirmed its position in rejecting R.C. § 2305.09(D) in the unreported decision of *Paladin v. Doyle*, Case No. 90-3242 1990 U.S. App. LEXIS 17324 (6th

Cir. 1990) (Appendix A). In *Paladin*, the plaintiffs sought to have R.C. § 2305.09(D) applied to § 1983 claims. The court rejected the statute, stating: "in light of our recent decision in *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 181-82 (6th Cir. 1990), that contention is without merit." *Id.* In *Collard*, an essentially similar statue of limitations was rejected by the Sixth Circuit.[1] The Sixth Circuit examined that statute in light of the holding in *Owens v. Okure* 488 U.S. 235 (1989) and held the statute was not applicable to § 1983 claims. The court stated:

> It is clear that Kentucky intended to generally deal with personal injury actions in § 413.140 and that § 413.140(1)(A) is appropriately referenced as a general personal injury limitation statute.

Id. at 182. In its unreported decision in *Paladin v. Doyle*, the Sixth Circuit Court of Appeals adopted its reasoning in *Collard* and rejected R.C. § 2305.09(D) as applicable to § 1983 claims arising in Ohio. (*Appendix A*).

A. THE DETERMINATION OF THE APPROPRIATE STATUTE OF LIMITATIONS FOR § 1983 ACTIONS IS PECULIARLY A FUNCTION OF FEDERAL LAW.

Petitioner looks to Ohio case law to determine which of Ohio's statute of limitations is the general or personal

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[1] Kentucky law provided a five-year statute of limitations for "an action for an injury to the rights of the plaintiff not arising on contract and not otherwise enumerated." Ky. Rev. Stat. An. § 413.120(6) (Baldwin 1988). *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, (6th Cir. 1990).

residual personal injury statute for § 1983 purposes. However, it is undisputed that the characterization of § 1983 claims for the purpose of determining the appropriate statute of limitations is the province of federal law. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Thus, the determination of which state's statute of limitations is the general statute of limitations for § 1983 purposes is properly governed by appropriate federal precedent. The application of federal law to the issue of statute of limitations in § 1983 claims is consistent with the need to promote uniformity and also provides for the " 'predominance of the federal interest' in the borrowing process taken as a whole." *Id.* at 269 (quoting *Burnett v. Grattan*, 468 U.S. 42, 48 (1984)). Reference to federal law in this matter demonstrates the applicable statute of limitations for § 1983 claims arising in Ohio is Ohio Rev. Code § 2305.10. *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989).

B. REFERENCE TO LAW OF OHIO DEMONSTRATES THAT R.C. § 2305.10 IS BROADLY CONSTRUED AS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS.

Even if this Court should accept petitioner's claim that state law should govern the determination of which various statute of limitations is the applicable statute of limitations for § 1983 claims, it is clear R.C. § 2305.10 is the general personal injury statute for Ohio. Although R.C. § 2305.10, by its language, appears to apply solely to claims of bodily injury, i.e., physical injury, the scope of R.C. § 2305.10 has been broadened by judicial construction to include substantially all claims for personal injury.

> [W]hether a suit is brought in contract or tort, when the "essence" of an action is wrongful harm to person or personal property, the R.C. § 2305.10 statute of limitations is the one to apply.

Ressallat v. Burglar & Fire Alarms Inc., 79 Ohio App. 3d 43, 606 N.E.2d 1001 (1992) (citations omitted).

Of significance is petitioner's citation of *Lawyers Cooperative Pub. Co. v. Muething*, 65 Ohio St. 3d 273, 603 N.E.2d 969 (1992). An examination of that holding demonstrates that Ohio Rev. Code § 2305.10 is considered to be the general personal injury statute for personal injury claims for Ohio. In Ohio, the controlling rule of law of an Ohio Supreme Court opinion is found in the court's syllabus. Ohio Supreme Court Rule for the Reporting of Opinions, Rule 1. The syllabus in *Muething* states:

> A negligence claim asserting *emotional distress, pain and suffering, humiliation, and loss of reputation is a claim for personal injuries* and is governed by the statute of limitations set forth in R.C. § 2305.10.

Muething, 65 Ohio St. 3d at 273, syllabus 2, 603 N.E.2d at 969, syllabus 2 (emphasis added). Based on the decision from *Muething*, it is clear the Ohio Supreme Court regards all personal injury claims, including emotional distress, humiliation, and loss of reputation as governed by the general statute of limitations in R.C. § 2305.10.

In support of their position, petitioners rely upon cases which applied R.C. § 2305.09(D) to claims of intentional infliction of emotional distress and abuse of process. Both causes of action have as part of their basic elements intentional conduct. *See Lawyers Cooperative Pub.*

Co. v. Muething, 65 Ohio St. 3d 273, 603 N.E.2d 969 (1992); *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St. 3d 294, 626 N.E.2d 115 (1994) (Abuse of process requires evidence that a proceeding has been perverted to attempt to accomplish an ulterior purpose). However, the United States Supreme Court has expressly held that § 1983 claims should *not* be analogized to intentional torts. *Owens*, 488 U.S. at 249-250. The Sixth Circuit Court of Appeals cited this fact as an additional basis in rejecting § 2305.09(D). *Hull v. Cuyahoga Valley Joint Vocational School Dist. Board of Education*, 926 F.2d 505, 510 (6th Cir. 1991).

The fact that the state of Ohio may apply § 2305.09(D) to three identifiable causes of action does not mandate that it is the statute applicable to claims arising under § 1983. As provided by the United States Supreme Court in *Wilson* and *Owens*, resort to the residual or catch-all statute is only necessary where state law does not provide a general personal injury statute. *Wilson* 471 U.S. at 278. *Owens*, 488 U.S. 250, n. 12. Here, Ohio clearly provides a general personal injury statute in R.C. § 2305.10.

C. A MAJORITY OF COURTS IN OHIO WHICH HAVE CONSIDERED THE ISSUE HAVE ADOPTED R.C. § 2305.10 AS THE APPLICABLE STATUTE OF LIMITATION FOR § 1983 CLAIMS.

Petitioner asserts the decision in *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 581 N.E.2d 625 (Trumble Cty. 1990) is the controlling decision from Ohio on this issue. However, it is apparent that the decision in *Bojac* is in the minority of Ohio courts which has considered the

issue. The majority of decisions in Ohio, post *Owens*, have determined that R.C. § 2305.10 is the limitations period which is applicable to § 1983 claims. *See e.g., Francis v. Cleveland*, 78 Ohio App. 3d 593, 605 N.E.2d 966 (1992). *Dennis v. Toledo Police Dept.*, Case No. L-90-157 1991 Ohio App. LEXIS 1583 (Lucas Cty. 1991) (Appendix B); *Twine v. Probate Court*, Case No. 89AP-1170, 1990 Ohio App. LEXIS 2665 (Franklin Cty.), *mot. overruled*, 55 Ohio St. 3d 706, 563 N.E.2d 301 (1990) (Appendix C); *Freshour v. Carroll*, Case No. 88CA 34, 1989 Ohio App. LEXIS 3273 (Pickaway Cty. 1989), *mot. overruled*, 48 Ohio St. 3d 706, 549 N.E.2d 1193 (1990) (Appendix D).

The Ohio Supreme Court has never spoken on the issue of the applicable statute of limitations for § 1983 claims. If this court should adopt petitioners' argument that the determination of the appropriate statute of limitations for § 1983 claims is a function of state law, the applicable majority rule in the state of Ohio mandates the adoption of R.C. § 2305.10 as the appropriate statute of limitations for § 1983 claims. The fact that these various courts agree with and have adopted the Sixth Circuit's selection of the general statute of limitations of § 2305.10 does not detract from the precedential value of these decisions.

D. APPLICATION OF R.C. § 2305.10 PROMOTES THE REMEDIAL PURPOSE OF § 1983 WHILE AT THE SAME TIME FURTHERING THE GOAL OF A STATUTE OF LIMITATION.

The en banc decision rendered in *Browning v. Pendleton*, five years ago resolved the dispute as to the

appropriate statute of limitations for § 1983 claims in Ohio. The decision in *Browning*, based on this Court's guidance in *Owens* and *Wilson*, provided a measure of uniformity and predictability for § 1983 claimants in determining that the appropriate statute of limitations in Ohio, for § 1983 claims, is two years. The adoption of a two-year statute of limitations for § 1983 claimants promotes the remedial purposes of § 1983 by providing a significant period of time in which to obtain relief for the violation of an individual's civil rights while at the same time promoting justice by preventing surprise from the reemergence of stale claims. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974).

In fact, the two-year period which has been applied to § 1983 claims in the last five years in the state of Ohio is uniform with that of several other states. *See e.g., Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.), *cert. denied* 493 U.S. 860 (1989) (two-year statute of limitations Nev. Rev. Stat. § 11.190(4)(E)(1993)); *Kalimara v. Illinois Dept. of Corrections*, 879 F.2d 876 (7th Cir. 1989) (two-year statute of limitations in Illinois, Ill. Rev. Stat. Ch. 110, para. 13-202) (currently 735 ILCS 5/13-202 (1994)); *Burrell v. Newesome*, 883 F.2d 416 (5th Cir. 1989) (two-year statute of limitations in Texas, Texas Civ. Prac. & Rem. Code § 16.003(A) (1994); *Coopwood v. Lake County Comm. Dev. Dept.*, 932 F.2d 677, 678 (7th Cir. 1991) (two-year statute, Ind. Code § 34-1-2-2 (Burns 1993); *Cito v. Bridgewater Township Police Dept.*, 892 F.2d 23 (3d Cir. 1989) (two-year New Jersey statute, N.J. Stat. 2A: 14-2 (1993)).

As indicated, the goal of the decision in *Wilson* and *Owens* was to provide uniformity and predictability with

respect to § 1983 claims. Application of the general personal injury statute in Ohio, § 2305.10 clearly promotes the desired uniformity with respect to claims arising under § 1983.

CONCLUSION

Based on the uniformity and predictability provided by the en banc decision of *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc) and the consistency of that decision with United States Supreme Court precedent as well as Ohio precedent, respondent submits petitioner's Petition for Certiorari should be rejected. It is respectfully submitted that the Petition for a Writ of Certiorari should be denied and petitioners request for summary reversal be rejected.

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APPENDIX

Appendix A *Paladin v. Doyle*, Case No. 90-3242, 1990 U.S. App. LEXIS 17324 (6th Cir. 1990).....1A

Appendix B *Dennis v. Toledo Police Dept.*, Case No. L-90-157, 1991 Ohio App. LEXIS 1583 (Lucas Cty. 1991) 4A

Appendix C *Twine v. Probate Court*, Case No. 89AP-1170, 1990 Ohio App. LEXIS 2665 (Franklin Cty.), *mot. overruled*, 55 Ohio St. 3d 706, 563 N.E.2d 301 (1990) 13A

Appendix D *Freshour v. Carroll*, Case No. 88CA 34, 1989 Ohio App. LEXIS 3273 (Pickaway Cty. 1989), *mot. overruled*, 48 Ohio St. 3d 706, 549 N.E.2d 1193 (1990).....20A

APPENDIX A

RICHARD A. PALADIN; SALLY J. PALADIN, Plaintiffs-Appellants, v. THOMAS C. DOYLE, Detective; ROBERT JAKSA, Detective; WILLIAM DEPLEDGE, Chief of Police; CITY OF EASTLAKE, Defendants-Appellees

PALADIN v. DOYLE

No. 90-3242

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1990 U.S. App. LEXIS 17324

September 27, 1990, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 914 F.2d 1494, 1990 U.S. App. LEXIS 24345.

PRIOR HISTORY:

On Appeal from the United States District Court for the Northern District of Ohio; No. 89-01929; Krenzler, Judge.

JUDGES: Kennedy and Krupansky, Circuit Judges; and Engel, Senior Circuit Judge.

OPINION: ORDER

Plaintiffs, Richard A. and Sally J. Paladin, appeal an order of the district court which dismissed their civil rights action. They now move that the appeal be heard by the court sitting en banc. Upon review of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On October 6, 1989, plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Ohio. As the basis of their request for both punitive and compensatory damages, they alleged that on July 3, 1986, defendants, the city of Eastlake, Ohio and its law enforcement agents, subjected them to an illegal arrest and interrogation. Based upon the contention that the complaint had been filed outside the two year period provided by Ohio Rev. Code § 2305.10, the statute of limitations governing civil rights actions arising in that state, defendants sought the dismissal of the complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b) (6). After consideration of plaintiffs' response, the district court agreed and dismissed the complaint. Plaintiffs then filed this appeal.

After thorough consideration of the record and the arguments contained in plaintiffs' brief, this court has concluded that the district court did not err in dismissing the complaint. In Browning v. Pendleton, 869 F.2d 989,

992 (6th Cir. 1989) (en banc), this court held that pursuant to Ohio Rev. Code § 2305.10 civil rights actions arising in that state must be brought within two years of their accrual. Plaintiffs' cause of action, which was grounded upon allegations of false arrest and imprisonment, accrued on July 3, 1986. McCune v. City of Grand Rapids, 842 F.2d 903, 906 (6th Cir. 1988). As plaintiffs did not file their complaint until more than three years after that date, their cause of action is clearly barred by the statute of limitations. Furthermore, the court has considered plaintiffs' argument that the decision in Browning, 869 F.2d at 992, is in error and that the Ohio Rev. Code § 2305.09(D) should be adopted to provide a four year period for the commencement of such actions. In light of our recent decision in Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 181-82 (6th Cir. 1990), that contention is without merit.

Accordingly, the motion to hear the appeal en banc is denied and the district court's final order dismissing the complaint if [sic] hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

APPENDIX B

Robert Dennis, Appellant v. Toledo Police Department, et al., Appellees

Dennis v. Toledo Police Dept.

No. L-90-157

Court of Appeals of Ohio, Sixth Appellate District, Lucas County

1991 Ohio App. LEXIS 1583

April 12, 1991, Decided

PRIOR HISTORY:

Appeal from Trial Court No. CV 88-3966.

COUNSEL: Vesper C. Williams, II, for appellant.

Samuel J. Nugent, for appellees Toledo Police Department and M. Babcock.

David J. Simko, for appellee Lucas County Sheriff's Department.

JUDGES: Charles D. Abood, Judge, Melvin L. Resnick, Judge, James R. Sherck, Judge, concur.

OPINION: DECISION AND JOURNAL ENTRY

This case comes on appeal from a judgment of the Lucas County Court of Common Pleas which granted

summary judgment in favor of defendants-appellees, the Toledo Police Department and the city of Toledo on April 17, 1990, and in favor of appellee, the Lucas County Sheriff's Department on September 19, 1989. Partial summary judgment was also granted to appellee, Officer Michael Babcock of the Toledo Police Department on April 17, 1990.

Appellant, Robert E. Dennis, appeals the trial court's judgment and asserts the following assignment of error:

"1. The trial court erred in ruling on motions for summary judgment that defendants the City of Toledo, the Toledo Police Department and the Lucas County Sheriff Department were entitled to judgment as a matter of law pursuant to R.C. 2744.02(B) when the facts plead [sic] in plaintiff's Complaint also constitute a violation of Section 1983, Title 42, U.S. Code, the Fourth and the Fourteenth Amendments of the U.S. Constitution which are exempted by R.C. 2744.09(E)."

On December 12, 1987, appellant was arrested for aggravated burglary, disorderly conduct and resisting arrest.

On December 12, 1988, appellant filed a civil complaint against the Police Department of the City of Toledo; M. [Michael] Babcock, a Toledo police officer, and an unknown Toledo police officer both acting in their official capacities; the Lucas County Sheriff's Department and a Michael Price. The basis of the complaint was alleged official misconduct at the time of appellant's arrest on December 12, 1987.

The complaint alleged that Officer Babcock and the unknown Toledo police officer had assaulted appellant during the course of his arrest thereby causing him physical injury and emotional distress. Appellant claimed that appellees, the Toledo Police Department, Officer Babcock and the unknown Toledo police officer were liable for the injuries resulting from the assault under the common law theories of intentional or negligent assault, intentional infliction of emotional distress and respondeat superior.

In his complaint, appellant further alleged that, while in the Lucas County Jail, he was assaulted by another inmate, Michael Price. Appellant claimed that Price was known by the Lucas County Sheriff's Department to be dangerous and capable of violence and that the sheriff's department breached its duty to protect him while he was in its custody. Appellant further alleged that the Lucas County Sheriff's Department was negligent in that he was denied adequate medical treatment for the injuries received through Price's wrongful conduct.

Appellant prayed for compensatory and punitive damages and costs in a total amount of $220,000 – $100,000 from the Toledo Police Department for the assault, $20,000 from the Toledo Police Department for the intentional infliction of emotional distress and $100,000 from the Lucas County Sheriff's Department and Price.

All defendants, excepting Michael Price and the unknown Toledo Police officer[1] filed answers to the complaint. On July 5, 1989, appellee, the sheriff's department, filed a motion for summary judgment. This appellee asserted that the sovereign immunity statute, R.C. 2744.01, et seq. and, more specifically, R.C. 2744.02(B) and 2744.02(B)(4), precluded appellant's cause of action based on negligent conduct which allegedly occurred within a county jail and prevented the imposition of an award of civil damages upon a political subdivision of the state. Appellant never filed a memorandum in opposition to the motion for summary judgment.

On September 19, 1989, the trial court granted appellee's motion for summary judgment and found that the Lucas County Sheriff's Department was immune under R.C. 2744.02(B)(4).

On February 2, 1990, appellees, the city of Toledo, the Toledo Police Department, the unknown Toledo police officer and Officer Babcock filed a motion for summary judgment. The city of Toledo and the Toledo Police Department requested summary judgment on all of the allegations against them and based their motion on the sovereign immunity statute, specifically, on R.C. 2744.01(A)(1). The motion for summary judgment in favor of the unknown Toledo police officer was founded upon Civ. R. 3(A), failure to name and serve a party within one year of the commencement of a civil action. As

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[1] Michael Price and the unknown Toledo police officer were never served with process. Neither ever appeared, in any way, in this action.

to Officer Babcock, the motion requested summary judgment only as to any negligent acts which he allegedly committed in the course of his employment as a Toledo police officer. Appellees asserted that Officer Babcock was immune from liability for such acts under R.C. 2744.03(A)(6).

On February 27, 1990, appellant filed a memorandum in opposition to appellees' motion for summary judgment. In that motion, appellant claimed, among other things, that his complaint set forth a cause of action pursuant to 42 USC § 1983 ("Section 1983"). That is, appellant maintained that the complaint stated a civil action based upon alleged violations of the Constitution or statutes of the United States and therefore, under R.C. 2744.09(E), the sovereign immunity statute was inapplicable to his cause of action.

On April 17, 1990, the trial court granted summary judgment in favor of the city of Toledo and the Toledo Police Department finding that these appellees were immune from civil liability by operation of R.C. 2744.02(B). The court further found that appellant had failed to state a cognizable claim pursuant to Section 1983. The unknown Toledo police officer was granted summary judgment as a matter of law. Officer Babcock was granted summary judgment only as to any alleged negligent acts. The court in ruling on summary judgment denied the same as to the intentional infliction of emotional distress claim even though appellees' motion for summary judgment never addressed this issue. Therefore, the trial court's journal entry of April 17, 1990, is, in this regard only, a nullity. The trial court's judgment entry contained certification, as required by Civ. R. 54(B).

The sole question before this court is whether appellant's complaint states a claim against appellees under 42 USC § 1983 so as to prevent summary judgment based upon Ohio's sovereign immunity statute. In other words, did the trial court err in determining that no cognizable claim was stated in the complaint which would permit appellant's civil action to proceed under the auspices of R.C. 2744.09(E)?

Before a court may grant a motion for summary judgment, three criteria must be met. This tripartite test is set forth in Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, at 66, and requires that the movant demonstrate:

"(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

Civ. R. 8 provides the framework for notice pleading. Under Civ. R. 8(A) and (E), the pleader need only set forth sufficient operative facts to give the other party or parties fair notice of the nature of his action. Salamon v. Taft Broadcasting Co. (1984), 16 Ohio App. 3d 336, 338. However, the pleading must contain either direct allegations on every material point necessary to sustain recovery on any legal theory or contain allegations from which an inference may be drawn that evidence on the material points will be presented at trial. Francher v. Francher (1982), 8 Ohio App. 3d 79, 83, quoting 5 Wright & Miller,

Federal Practice and Procedure: Civil (1969), at 120-123, Section 1216.

In the instant case, appellant set forth four causes of action. Nowhere in his complaint did he expressly assert a claim pursuant to Section 1983. The case proceeded upon the common law theories of intentional or negligent assault, intentional infliction of emotional distress, breach of a duty to protect (negligence) and breach of a duty to provide adequate medical care (negligence). Because appellant raised civil rights violations as against the Lucas County Sheriff's Department for the first time on appeal, that governmental entity had no notice of or opportunity to defend against a Section 1983 claim. In fact, appellant's civil rights theory was asserted, for the first time, more than two years after his cause of action under Section 1983 had accrued. Essentially, in raising the issue in his memorandum in opposition to the motion of the city of Toledo, et al., for summary judgment, appellant sought to amend his pleadings without following the procedures required by Civ. R. 15 and, in the process, prevent his civil rights action as against the Lucas County Sheriff's Department from being time-barred by the statute of limitations. See Browning v. Pendleton (C.A.6, 1989), 869 F. 2d 989 (two year statute of limitations for Section 1983 actions based on personal injury). This was not the purpose for which the civil rules were promulgated.

Furthermore, appellant's complaint fails to state a claim under Section 1983 as against any of the appellees. Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. 1946 St. Clair Corp. v. Cleveland (1990), 49 Ohio St. 3d 33, 34,

citing Monroe v. Pape (1961), 365 U.S. 167. Under the provisions of Section 1983, the complaint must allege that (1) some person has deprived the plaintiff of a federal right; and (2) the person who deprived the plaintiff of that right acted under the color of state or territorial law. Gomez v. Toledo (1980), 446 U.S. 634; 1946 St. Clair Corp., supra, at 34. While a plaintiff may seek redress against a governmental entity, e.g., a municipality, pursuant to Section 1983, Monell v. Department of Social Services (1978), 436 U.S. 658, an additional allegation must be included in the complaint. The complaint must assert that the action complained of was due to an established practice, policy or custom of the governmental entity. Canton v. Harris (1989), 479 U.S. 378, 109 S. Ct. 1197. See, also, Taylor v. Canton Ohio Police Dept. (N.D. Ohio 1982), 544 F. Supp. 783, 788. A plaintiff must, therefore, Set forth facts showing the existence of an offending custom or policy and mere conclusory allegations are insufficient. Sierra v. Lehigh County (E.D. Pa. 1985), 617 F. Supp. 427; Taylor, supra. In addition, in a case where a government employee is sued in his official capacity only, the claim is to be treated as being against the governmental entity of which the employee is an agent. Kentucky v. Graham (1985), 473 U.S. 159, 165. Therefore, a plaintiff in a Section 1983 case who names an employee in his official capacity only is seeking recovery from the governmental entity itself and is not attempting to establish the personal liability of the employee. Id.

We note that appellant named Officer Michael Babcock as a defendant in his official capacity only and did not seek recovery of damages from Babcock as an individual. Accordingly, for the purposes of this appeal,

appellant's alleged civil rights action shall be considered as being against only the governmental entities named as defendants in appellant's complaint.

A reading of appellant's complaint discloses that sufficient operative facts were provided which could, arguably, be interpreted to allege a violation of appellant's federal rights, e.g., the Fourth and Eighth Amendments of the Constitution of the United States, by persons acting under the color of state law, i.e., law enforcement officers and county officials acting under the authority of state law. Nonetheless, appellant's county officials complaint fails to set forth any facts which could be construed to demonstrate that the police officers or members of the sheriff's department were acting pursuant to a custom or policy of their respective governmental agencies. Thus, the complaint in this case fails to set forth operative facts sufficient to give fair notice that the action contains a claim made pursuant to Section 1983. Strauss v. Chicago (C.A.7, 1985), 760 F. 2d 765. Therefore the trial court did not err in concluding that, as a matter of law, no genuine issue existed as to whether appellant had properly set forth a claim pursuant to Section 1983. Appellant's sole assignment of error is found not well-taken.

On consideration whereof, this court finds substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal assessed to appellant.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

APPENDIX C

Rebecca Wright Twine, M.D., Plaintiff-Appellant, v. Probate Court, Franklin County, Ohio, et al., Defendants-Appellees

Twine v. Probate Court, Franklin County, Ohio

No. 89Ap-1170

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

1990 Ohio App. LEXIS 2665

June 28, 1990, Rendered

PRIOR HISTORY:

Appeal from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: MS. REBECCA WRIGHT TWINE, M.D., pro se.

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. MARK E. LINDER, for appellees.

JUDGES: Koehler, J. Bowman and Young, JJ., concur. Koehler, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

OPINION BY: KOEHLER

OPINION: OPINION

This case is on appeal from a judgment of dismissal by the Franklin County Court of Common Pleas in favor of defendants-appellees, Franklin County Probate Court, Judge Richard Metcalf, and a referee, William A. Reddington.

On May 9, 1989, plaintiff-appellant, Rebecca Wright Twine, M.D., filed a complaint against appellees for false imprisonment, malicious prosecution, slander/libel, assault and battery, abuse of process, invasion of privacy, and violation of her civil rights pursuant to Section 1983, Title 42, U.S. Code. Appellant sought monetary and punitive relief, as well as a judicial expungement of her record.

The facts in this case indicate that on November 18, 1986, appellant's husband, by sworn affidavit in the Franklin County Probate Court, claimed that appellant represented a substantial risk of harm to others. It was then determined that appellant was in need of treatment for a mental illness. The support for this belief was verified by a licensed physician.

Based upon this sworn information, referee-appellee, William A. Reddington, recommended a temporary order of detention. The court thereupon issued a temporary order of detention ordering the sheriff's department to take appellant into custody and transport her to Harding Hospital.

Appellant was taken into custody and served with a copy of the temporary order of detention and a copy of the rights of involuntarily detained persons. An independent expert evaluation concerning appellant's mental condition was thereby performed.

At a hearing to determine whether appellant was mentally ill person subject to hospitalization, appellant voluntarily agreed to be placed in Harding Hospital for treatment. On December 26, 1986, appellant was discharged. As a result of her alleged improper and unnecessary institutionalization, appellant sought recovery in damages and other relief due to violations of her civil rights in finding her "mentally ill."

Appellees filed a motion to dismiss on June 14, 1989. The Franklin County Court of Common Pleas entered a judgment of dismissal in favor of appellees on July 17, 1989. A motion to reinstate this action by appellant was denied by the lower court on September 20, 1989.

Appellant now brings the instant appeal asserting that the lower court's dismissal of her complaint was improper since the statute of limitations was tolled due to the "doctrine of discovery" on all of her causes of action. We do not agree.

R.C. 2744.04(A) states:

"An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action arose, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the states." (Emphasis added.)

Further, R.C. 2305.11(A) provides:

"An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued * * * ."

Accordingly, appellant's causes of action for false arrest, libel/slander, abuse of process, false imprisonment, and malicious prosecution must be brought within one year from the time the cause accrued. The assault and battery claim pursuant to R.C. 2305.111 must also be brought within one year. In addition, appellant's invasion of privacy and civil rights causes of action apply the general two-year statute of limitations for personal injury cases found in R.C. 2305.10. See Valerio v. Dahlberg (1988), 716 F. Supp. 1031.

In the present case, appellant was hospitalized on November 18, 1986, by an order of temporary detention ordered by the Franklin County Probate Court. Appellant was served with said order on this date and read her rights as involuntarily detained person. At a subsequent hearing to determine whether appellant was a mentally ill person, subject to hospitalization by court order, appellant, who was represented by counsel, voluntarily agreed to treatment. On December 26, 1986, appellant was discharged.

The statutes of limitation found in R.C. 2305.10, 2305.11, and 2305.111 all commence upon the discovery date the injury or claim occurred or should have occurred. O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St.

3d 84. Appellant's causes of action in this matter occurred as a result of her alleged invalid detention, apprehension, and hospitalization by the Franklin County Probate Court on November 18, 1986. However, appellant's subsequent discharge on December 26, 1986, clearly establishes the starting date for statute of limitations purposes.

Appellant knew, or should have known, of her alleged injuries by the date of her discharge from Harding Hospital. In addition, appellant's contentions that she was not mentally ill arguably would move the date she knew of her injuries and claims to November 18, 1986, due to her knowledge of the order of detention issued by the probate court.

Therefore, the statute of limitations for appellant's causes of action in false arrest, libel/slander, abuse of process, false imprisonment, assault and battery and malicious prosecution expired on December 26, 1987. The statute of limitations for invasion of privacy and the Section 1983 claim expired on December 26, 1988. Appellant is clearly time barred since her complaint was filed on May 9, 1989 in the court below. The argument advanced by appellant indicating that the "discovery rule" tolled the statute of limitations is accordingly not well-taken.

Further, appellant's substantive claims against judicial officers of the Franklin County Probate Court cannot withstand the doctrine of judicial immunity.

Although R.C. Chapter 2743 waives the doctrine of sovereign immunity by the State of Ohio, these statutes do not create new causes of action. Thus, for a cause of

action to be recognizable against the state, it must be proper as if between two private litigants.

It is a well-established principle of law that a judge or judicial officer will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority. However, a judge may be subject to liability when acting in a "clear absence of all jurisdiction." Bradley v. Fisher (1872), 13 Wall. 335, 351, 20 L.Ed. 646. See, also, Willitzer v. McCloud (1983), 6 Ohio St. 3d 447.

A judge is exempt from civil liability for "actions" in his judicial capacity. The factors determining whether an act by a judge is a "judicial one" relate to the nature of the act itself; i.e., whether it is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. Stump v. Sparkman (1978), 435 U.S. 349, 98 S.Ct. 1099.

The conduct of referee Reddington and Judge Metcalf through the recommendation and subsequent order of detention of appellant due to a mental disorder clearly is cloaked in "judicial immunity." The actions taken by the probate referee and judge are judicial in nature and are a function of their public obligation and responsibility.

Therefore, appellant's causes of action permitted by R.C. Chapter 2743 are barred by the doctrine of judicial immunity. No common law cause of action against a judicial officer exists for those acts which are solely judicial in nature.

Appellant's causes of action against appellees fail as untimely within the applicable statute of limitation. Further, the doctrine of judicial immunity precludes the substantive claims in this case based on the performance of "judicial acts."

Appellant's assignment of error is accordingly overruled.

For the foregoing reasons, the assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

APPENDIX D

Paul L. Freshour, Plaintiff-Appellant v. Dr. Carroll, M.D., et al, Defendant-Appellees

Freshour v. Carroll

No. 88 CA 34

Court of Appeals of Ohio, Fourth Appellate District, Pickaway County

1989 Ohio App. LEXIS 3273

August 17, 1989, Decided

DISPOSITION:

JUDGMENT AFFIRMED

JUDGES: Earl E. Stephenson, Judge, Abele, P.J., Concurs In Judgment & Opinion, Grey, J., Dissents with Opinion.

OPINIONBY [sic]: STEPHENSON

OPINION: DECISION AND JUDGMENT ENTRY

Earl E. Stephenson, J.

This is an appeal from a judgment entered by the Pickaway County Court of Common Pleas dismissing on motion an action filed by Paul L. Freshour, appellant herein, seeking the recovery of money damages. Jailer Marvin Widman and a Dr. Carroll, M.D., appellees herein, were made defendants.[1]

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[1] A motion was made by appellant to this court, which is hereby granted, to dismiss the appeal against Marvin Widman. Thus, we review only with respect to the dismissal of the action against Dr. Carroll.

Appellant's brief sets forth three "arguments" which we will treat as assignments of error.

ARGUMENT NUMBER ONE:

The Trial Court erred when claiming Plaintiff's action must be denied due to the Statute of Limitations. Plaintiff has a right for his actions to be heard especially since it was filed within a proper time, however delayed by a prejudice and bias Judge. The Defendant evades the real issue of medication.

ARGUMENT NUMBER TWO:

The Trial Court erred when claiming Plaintiff's action Res Judicata. Plaintiff's action can never be Res-Judicata especially since the plaintiff has fought hard within the proper Statute of Limitations in ascertaining the truth of why he was denied medication. The defendant evades the real issue of medication.

ARGUMENT NUMBER THREE:

The Trial Court erred when the trial Judge set in judgement [sic] of plaintiff's claims from which this trial Judge's known prejudice and bias and is engaged in actions with plaintiff of his own."

The record reflects that on May 2, 1988 appellant instituted an action in the court below by filing several documents, including two entitled "Complaint". The following is a summary of the complaint averments. On February 25, 1983, appellant was arrested and confined in the pickaway [sic] County jail. While being booked, appellant informed the jail authorities of his medical needs. It is further averred that although he informed the jailer on numerous occasions of his need for breathing

medication, no medication was furnished nor did he receive medical attention for a broken bone in his right hand, which injury occurred in the jail from getting down from a top bunk.

It is also averred that medication was sent to the jail by appellant's personal physician, but not given to appellant. It is further averred that the jail doctor admitted seeing appellant on two different occasions. "However the jail Doctor who seen plaintiff on at least two different occasions failed in providing the plaintiff with proper breathing medication even after seeing plaintiff and having the proper (in processing form) before him each time, that confirmed and informed of plaintiff's medical need of breathing medication, however as the medical records confirm Plaintiff without this medication regardless, even after being seen by Dr. Carroll, (the jail Doctor) on two different occasions. It is then averred that the neglect of medical treatment was caused by both defendants.

The complaint alleges a violation of a constitutional right to medical treatment and the denial was cruel and unusual punishment. Appellant prayed for the recovery of $25,000 from each defendant and, additionally, requested that Judge William C. Ammer, the resident Pickaway County judge, not hear the action.

On May 16, the then prosecuting attorney filed a Civ. R. 12(B)(6) motion to dismiss for failure to state a claim for relief against either defendant. The memorandum in support sought dismissal for failure to set forth factual allegations supporting a claim, and that the action was barred by the doctrine of res adjudica and collateral estoppel by reason of the filing in the Federal District

Court of the same claim against the pickaway [sic] County Sheriff Dwight Radcliff, which action was dismissed upon summary judgment. Dismissal was also sought on statute of limitation grounds.

The court issued, on August 3, 1988, an opinion, followed by entry, dismissing the complaint. The dismissal ground was, in substance, that the doctrine of collateral estoppel applied by the reason of the federal court and barred relitigation of the same issue in state court. Additionally, the court concluded the allegations against Dr. Carroll were either based upon a claim of malpractice or was a civil rights action, both of which were barred by the statute of limitations.

In adjudicating a Civil R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, it is fundamental that the court is confined solely to the averments of the complaint. Civ. R. 12(B) provides as follows:

"Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * * . When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * * * All parties shall be given

reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

If a court converts a Civ. R. 12(B)(6) motion to one for summary judgment in order to utilize outside material, notice must be given to the parties at least fourteen days before the time fixed for hearing. Federal Department Stores v. Lindley (1987), 30 Ohio St. 3d 135. It follows that the court's dismissal upon the ground of collateral estoppel based upon the federal district judgment was error since no notice of conversion to summary judgment was given.

The second assignment of error is sustained. However, a reversal is not required by reason of our disposition of the first assignment of error wherein we hold the action was barred by the statutes of limitations.

A motion dismiss may be granted for failure to state a claim when on the face of the complaint it appears the action is barred by the appropriate statute of limitations. Mills v. Whitehouse Trucking Co. (1974), 40 Ohio St. 2d 55. It must be conclusively demonstrated by the complaint averments that the action is barred. Durham v. Anka Research Ltd. (1978), 60 Ohio App. 2d 239.

Under the complaint averments in the case sub judice, appellant is either asserting a malpractice claim against De. Carroll under state law or a civil rights action under federal law. R.C. 2305.11(B) provides, inter alia, the following:

"In no event shall any medical claim against a physician, * * * be brought more than four years after the act or omission constituting the alleged malpractice occurred.

The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2306.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file a action for malpractice against a physician or hospital."

R.C. 2305.16 provides, in part here pertinent, as follows:

"Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed."

Thus, while imprisonment ordinarily tolls the statute of limitation, at least where the cause of action accrues after imprisonment, see Hibbert v. City of Cinn. (1982), 4 Ohio App. 3d 128, the tolling statute is expressly excluded by R.C. 2305.11(B) so that the action is barred four years after the act of malpractice occurred.

Alternatively, appellant's complaint arguably sets forth a claim for relief under Title 42 U.S.C. 1983,[2] which statute reads as follows:

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[2] State courts have jurisdiction over federal civil rights claims. Martinez v. California (1980), 444 U.S. 277.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Congress has not exacted a statute of limitations with respect to time periods for commencement of an action under Title 42 USC 1893 [sic]. In Wilson v. Garcia (1985), 471 U.S. 261, the court recognized the practice under 42 USC 1988 to determine the applicable state statute of limitations by stating the following at 267:

"First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 USC Sec. 1988 [42 USCS Sec. 1988].] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the constitution and laws of the United States,' Ibid. Burnett v. Grattan, 468 US 42, 47-48, 82 LEd 2d 36, 104 S Ct 2924 (1984)."

Because of the difficulties attendant to step two, the court in Wilson v. Garcia, supra, held that Sec. 1983 actions are best characterized as personal injury actions for statute of limitation purposes. Thus, it follows that the two year limitation in R.C. 2305.10 is applicable.

In applying a state's statute of limitations, the tolling provisions are also applicable unless such tolling provision is inconsistent with policies underlying Sec. 1983. Board of Regents v. Tomanio (1980), 446 U.S. 478. Since appellant's federal cause of action arose after he was imprisoned, facially the tolling provision of R.C. 2305.16 would be applicable. However, in Vargas v. Jago (1986), 636 F. Supp. 425 (S.D. Ohio), the court held the tolling provision inconsistent with state law. In so holding the court stated, inter alia, as follows:

"It has long been this Court's opinion that the filing of section 1983 suits by prisoners serves a rehabilitative function, acting as a 'safety valve,' as it were, to relieve some of the tremendous pressure that builds in any captor/captive situation. By giving due consideration to the suits filed in which deprivations of civil rights are alleged, we hope to engender in those convicted and imprisoned a sense of respect for the law, not an easy task given the jaundiced eye with which most prisoners observe those in legal authority. The Supreme Court has held that one of the principal policies embodied in section 1983 is deterrence. Id. at 488, 100 S.Ct. at 1797. We cannot help but believe that, in order to effect the rehabilitative purpose described above, as well as to deter prison officials from misconduct, quick resolution of disputes is vital. Promptness is even more important, we think, when a prisoner is complaining that his current incarcerators are violating, or have violated, his civil rights. To allow a prisoner one year after his release to bring his section 1983 suit neither would effect deterrence as to the alleged offender, nor rehabilitation as to the alleged victim. Thus, so long as the state system erects no

barriers to the federal courts, we regard application of the state disability tolling statute to be 'inconsistent' with federal law."

It follows, therefore, that whether the complaint be one for relief under state or federal law, or both, the cause of action is barred by R.C. 2305.11(B) under the state claim and by R.C. 2305.10 under the federal claim.[3]

The first assignment of error is overruled.

Either is there any merit in the third assignment of error of prejudice and bias against appellant by the trial judge. Aside from the record being deficient for purpose of review, assuming, arguendo, such prejudice existed and the judge should not have presided, it was harmless error since the decision was one of law which we herein affirm as properly decided.

It is ordered that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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[3] Appellant's complaint is arguably deficient to state a claim against Dr. Carroll since the eighth amendment cruel and unusual punishment provision applies only when there is a "deliberate indifference" to serious medical needs of prisoners. Estelle v. Gamble (1976), 429 U.S. 97. The complaint does not contain such averment. However, since appellant is proceeding pro se and a Civ. R. 12(B)(6) motion should be granted only when it is clear beyond doubt that appellant could prove no set of facts entitling him to relief, see Conley v. Gibson (1957), 355 U.S. 41, 45, we do not place our decision on that ground.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DISSENTBY [sic]: GRAY

DISSENT:

GREY, J. DISSENTING:

I respectfully dissent.

I would sustain Freshour's first assignment of error because I do not believe his action to be barred by the statutes of limitation. In overruling Freshour's first assignment of error, the majority relies heavily on Vargas v. Jago, supra, In determining that application of the tolling provision was inconsistent with state and federal law.

In order to determine whether enforcing a tolling provision is either consistent or inconsistent with prevailing law, one must look to the spirit behind that provision. If one believes that the real purpose of the statute of limitations is to bar a plaintiff and deny him access to the courts, then, clearly, denying the application of the tolling provision is consistent with state and federal law. However, if one believes, as I do, that the purpose of the tolling provision is to allow individuals a reasonable time in which to obtain access to the courts, then allowing the

application of such a provision would be consistent with the spirit of the provision.

Here, the majority's opinion appears to go against the true spirit of the tolling provision, R.C. 2305.10. We reward litigious parties who sue first and think later; we look for ways to dismiss suits brought by more reflective parties; and then we wonder why litigation is increasing exponentially.

I don't wonder, but I do dissent.